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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT TACOMA

8 WILLIE BANKS, SR.

9 Plaintiff,

10 v.

11 STATE OF WASHINGTON, *et al.*,

12 Defendants.

No. C09-5449 RBL/KLS

ORDER TO AMEND OR SHOW CAUSE

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14 This matter has been referred to Magistrate Judge Karen L. Strombom pursuant to 28  
15 U.S.C. § 636(b)(1), Local Rules MJR 3 and 4. Plaintiff has been granted leave to proceed *in*  
16 *forma pauperis*. Dkt. 4. The case is before the Court upon review of Plaintiff's complaint.

17 After reviewing the Complaint and balance of the record, the Court finds and orders as follows:

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19 **I. DISCUSSION**

20 Under the Prison Litigation Reform Act of 1995, the Court is required to screen  
21 complaints brought by prisoners seeking relief against a governmental entity or officer or  
22 employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint  
23 or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that  
24 fail to state a claim upon which relief may be granted, or that seek monetary relief from a  
25 defendant who is immune from such relief. 28 U.S.C. §§ 1915A(b)(1), (2) and 1915(e)(2); See  
26 *Barren v. Harrington*, 152 F.3d 1193 (9th Cir. 1998).

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1 A complaint is legally frivolous when it lacks an arguable basis in law or fact. *Neitzke v.*  
2 *Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir.  
3 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an  
4 indisputably meritless legal theory or where the factual contentions are clearly baseless. *Neitzke*,  
5 490 U.S. at 327. A complaint or portion thereof, will be dismissed for failure to state a claim  
6 upon which relief may be granted if it appears the “[f]actual allegations . . . [fail to] raise a right  
7 to relief above the speculative level, on the assumption that all the allegations in the complaint  
8 are true.” See *Bell Atlantic, Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007)(citations omitted).  
9 In other words, failure to present enough facts to state a claim for relief that is plausible on the  
10 face of the complaint will subject that complaint to dismissal. *Id.* at 1974.

12 The court must construe the pleading in the light most favorable to plaintiff and resolve  
13 all doubts in plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Although  
14 complaints are to be liberally construed in a plaintiff’s favor, conclusory allegations of the law,  
15 unsupported conclusions, and unwarranted inferences need not be accepted as true. *Id.* While the  
16 court can liberally construe plaintiff’s complaint, it cannot supply an essential fact an inmate has  
17 failed to plead. *Pena*, 976 F.2d at 471 (quoting *Ivey v. Board of Regents of Univ. of Alaska*, 673  
18 F.2d 266, 268 (9th Cir. 1982)).

20 Unless it is absolutely clear that amendment would be futile, however, a pro se litigant  
21 must be given the opportunity to amend his complaint to correct any deficiencies. *Noll v.*  
22 *Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

24 On the basis of these standards, Mr. Banks appears to have failed to state a claim upon  
25 which relief can be granted.

1 Mr. Banks purports to sue the State of Washington, a superior court judge and Western  
2 State Hospital because his state court trial, originally scheduled to begin on June 29, 2009, was  
3 continued while he was forced to undergo a mental evaluation at Western State Hospital. Dkt. 5,  
4 pp. 3-4. Mr. Banks asks to be immediately released from restraint. Dkt. 5, p. 5.

5 To state a claim under 42 U.S.C. § 1983, at least two elements must be met: (1) the  
6 defendant must be a person acting under color of state law, (2) and his conduct must have  
7 deprived the plaintiff of rights, privileges or immunities secured by the constitution or laws of  
8 the United States. *Paratt v. Taylor*, 451 U.S. 527, 535 (1981).

9 This action challenges the propriety of ongoing proceedings in Cowlitz County Superior  
10 Court. Generally, federal courts will not intervene in a pending criminal proceeding absent  
11 extraordinary circumstances where the danger of irreparable harm is both great and immediate.  
12 See *Younger v. Harris*, 401 U.S. 37, 45 46 (1971); see also *Fort Belknap Indian Community v.*  
13 *Mazurek*, 43 F.3d 428, 431 (9th Cir.1994), cert. denied, 116 S.Ct. 49 (1995) (abstention  
14 appropriate if ongoing state judicial proceedings implicate important state interests and offer  
15 adequate opportunity to litigate federal constitutional issues); *World Famous Drinking*  
16 *Emporium v. City of Tempe*, 820 F.2d 1079, 1082 (9th Cir.1987)(Younger abstention doctrine  
17 applies when the following three conditions exist: (1) ongoing state judicial proceeding; (2)  
18 implication of an important state interest in the proceeding; and (3) an adequate opportunity to  
19 raise federal questions in the proceedings).

20 Only in the most unusual circumstances is a petitioner entitled to have the federal court  
21 intervene by way of injunction or habeas corpus until after the jury comes in, judgment has been  
22 appealed from and the case concluded in the state courts. *Drury v. Cox*, 457 F.2d 764, 764 65  
23 (9th Cir.1972). See *Carden v. Montana*, 626 F.2d 82, 83 84 (9th Cir.), cert. denied, 449 U.S.

1 1014 (1980). Extraordinary circumstances exist where irreparable injury is both great and  
2 immediate, for example where the state law is flagrantly and patently violative of express  
3 constitutional prohibitions or where there is a showing of bad faith, harassment, or other unusual  
4 circumstances that would call for equitable relief. *Younger*, 401 U.S. at 46, 53-54.

5 Here, the Plaintiff has not plead any extraordinary circumstances warranting intervention  
6 by this Court in any ongoing state proceeding. He has also not plead any violation of rights  
7 protected by the Constitution or federal statute. If Plaintiff wishes to proceed with a claim, he  
8 must provide a short and plain statement indicating how he has suffered a violation of rights  
9 protected by the Constitution or federal statute. He must further describe how such violation was  
10 proximately caused by a person acting under color of state or federal law.

12 Plaintiff is also advised that under 42 U.S.C. § 1983, claims can only be brought against  
13 people who personally participated in causing the alleged deprivation of a constitutional right.  
14 *Arnold v. IBM*, 637 F.2d 1350, 1355 (9<sup>th</sup> Cir. 1981). Neither a State nor its officials acting in  
15 their official capacities are “persons” under section 1983. *Will v. Michigan Dept. of State Police*,  
16 491 U.S. 58, 71 (1989). Thus, the “State of Washington” is not a “person” under §1983.  
17 “Western State Hospital,” is also not a “person” under section 1983.

19 Plaintiff names Western State Hospital as a defendant, but fails to allege facts or name  
20 specific individuals to support any claim of constitutional harm. This is not sufficient to state a  
21 claim under 42 U.S.C. § 1983. Plaintiff must set forth facts describing when and where and by  
22 whom he was deprived of a constitutional right. Plaintiff’s Complaint must include factual  
23 allegations describing how each individual caused or personally participated in causing him the  
24 harm that he claims he suffered. In addition, Plaintiff must name the individuals who are  
25 responsible for causing him harm. It is not sufficient to merely name individuals in supervisory  
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positions. He must name the individual defendants who violated his federal rights and he must allege facts showing how individually named defendants caused or personally participated in causing the harm alleged in the complaint. *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981). A defendant cannot be held liable under 42 U.S.C. § 1983 solely on the basis of supervisory responsibility or position. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694 n.58 (1978). A theory of *respondeat superior* is not sufficient to state a § 1983 claim. *Padway v. Palches*, 665 F.2d 965 (9th Cir. 1982).

Plaintiff also purports to sue Judge Steven Warning, a judge of the Superior Court of Cowlitz County, Washington. However, judges are absolutely immune from liability for damages in civil rights suits for judicial acts performed within their subject matter jurisdiction. *Stump v. Sparkman*, 435 U.S. 349, 356 (1978); *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986) (en banc); *Schucker v. Rockwood*, 846 F.2d 1202, 1204 (9th Cir. 1988) (per curiam). Acts are judicial where the acts are normally performed by a judge, and where the parties deal with the judge in his or her judicial capacity. *Sparkman*, 435 U.S. at 362; *Crooks v. Maynard*, 913 F.2d 699, 700 (9th Cir. 1990). A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the clear absence of all jurisdiction, *Sparkman*, 435 U.S. at 356-57 (citation omitted); that is, when he or she acts in a private or nonjudicial capacity, see *Henzel v. Gerstein*, 608 F.2d 658 (5th Cir. 1979).

Due to the deficiencies described above, the Court will not serve the complaint. Mr. Banks may file an amended complaint curing, if possible, the above noted deficiencies, or show cause explaining why this matter should not be dismissed no later than **September 25, 2009**. If Mr. Banks chooses to file an amended complaint, which seeks relief cognizable under 42 U.S.C.

§ 1983, his amended complaint shall consist of a short and plain statement showing that he is entitled to relief, and he must allege with specificity the following:

- 1) the names of the persons who caused or personally participated in causing the alleged deprivation of his constitutional rights;
- 2) the dates on which the conduct of each defendant allegedly took place; and
- 3) the specific conduct or action Plaintiff alleges is unconstitutional.

Mr. Banks shall set forth his factual allegations in separately numbered paragraphs. The amended complaint shall operate as a complete substitute for (rather than a mere supplement to) the present complaint. Mr. Banks shall present his complaint on the form provided by the Court. The amended complaint must be legibly rewritten or retyped in its entirety, it should be an original and not a copy, it may not incorporate any part of the original complaint by reference, and it must be clearly labeled the “First Amended Complaint” and Cause Number C09-5449 RBL/KLS must be written in the caption. Additionally, Plaintiff must submit a copy of the “First Amended Complaint” for service on each named Defendant.

If Mr. Banks decides to file an amended civil rights complaint in this action, he is cautioned that if the amended complaint is not timely filed or if he fails to adequately address the issues raised herein on or before **September 25, 2009**, the Court will recommend dismissal of this action as frivolous pursuant to 28 U.S.C. § 1915 and the dismissal will count as a “strike” under 28 U.S.C. § 1915(g). Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner who brings three or more civil actions or appeals which are dismissed on grounds they are legally frivolous, malicious, or fail to state a claim, will be precluded from bringing any other civil action or appeal in forma pauperis “unless the prisoner is under imminent danger of serious physical injury.” 28 U.S.C. § 1915(g).

**The Clerk is directed to send Mr. Banks the appropriate form for filing a 42 U.S.C. 1983 civil rights complaint. The Clerk is further directed to send a copy of this Order and a copy of the General Order to Plaintiff.**

It is further **ORDERED** that Plaintiff's Motion for Order of Immediate Release from Custody and Dismissal with Prejudice (Dkt. 6) is **DENIED** as premature. The Court has not yet accepted an appropriate or sufficient complaint nor has any defendant yet been served.

DATED this 1st day of September, 2009.

  
Karen L. Strombom  
United States Magistrate Judge